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8

9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 \_\_\_\_\_  
12 CENTER FOR BIOLOGICAL DIVERSITY )  
and TURTLE ISLAND RESTORATION )  
13 NETWORK, )

14 Plaintiffs, )

15 v. )

16 DIRK KEMPTHORNE, Secretary of the )  
United States Department of the Interior, and )  
the UNITED STATES FISH AND )  
17 WILDLIFE SERVICE, )

18 Defendants. )  
19 \_\_\_\_\_

No. C 07-5109 PJH

**DEFENDANTS' ANSWER TO  
COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

20  
21 Defendants, Dirk Kempthorne, Secretary of the United States Department of the Interior, and  
22 the United States Fish and Wildlife Service, file this Answer to the above-captioned Complaint as  
23 follows:

24 **I. INTRODUCTION**

25 1. The allegations in paragraph 1 contain characterizations of Plaintiffs' case and conclusions  
26 of law to which no response is required.

27 2. The allegations in the first and third sentences of paragraph 2 purport to characterize certain  
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1 provisions of the Marine Mammal Protection Act (“MMPA”), which speak for themselves and are  
2 the best evidence of their contents. Any allegations inconsistent with the plain language and  
3 meaning of the MMPA are denied. In response to the allegations in the second sentence of  
4 paragraph 2, Defendants admit that stock assessment reports provide information such as the  
5 geographic range of the species or stock, a minimum population estimate, an estimate of the annual  
6 human-caused mortality and serious injury of the stock, and the status of the stock, but otherwise  
7 deny the allegations.

8 3. The allegations in paragraph 3 purport to characterize certain provisions of the MMPA,  
9 which speak for themselves and are the best evidence of their contents. Any allegations inconsistent  
10 with the plain language and meaning of the MMPA are denied.

11 4. In response to the allegations in the first and second sentences of paragraph 4, Defendants  
12 admit that final stock assessment reports for three stocks of northern sea otters in Alaska, two stocks  
13 of polar bears, and one stock of Pacific walrus were last announced in the Federal Register as  
14 available to the public on October 9, 2002, and admit that final stock assessment reports for northern  
15 sea otters in Washington, southern sea otters, and two stocks of West Indian manatees were last  
16 announced in the Federal Register as available to the public on October 4, 1995, but otherwise deny  
17 the allegations. In response to the allegations in the third sentence of paragraph 4, Defendants admit  
18 that some new information has become available on marine mammal species under the Service’s  
19 jurisdiction, but otherwise deny the allegations. In response to the allegations in the fourth sentence  
20 of paragraph 4, Defendants admit that global climate change may be a factor impacting sea ice  
21 habitat important to polar bears and walrus, admit that there have been strandings of southern sea  
22 otters in recent years due largely to disease and an unusual mortality event for Alaska northern sea  
23 otters that may have been due to a bacterial infection, and admit that manatees in Florida are  
24 susceptible to red tide toxins, but otherwise deny the allegations in the fourth sentence of paragraph  
25 4.

26 5. Defendants deny the allegations in paragraph 5.

27 6. The allegations in paragraph 6 contain characterizations of Plaintiffs’ case and conclusions

1 of law to which no response is required.

2 **II. JURISDICTION, VENUE AND INTRADISTRICT ASSIGNMENT**

3 7. The allegations in paragraph 7 consist of conclusions of law to which no response is  
4 required.

5 8. The allegations in paragraph 8 consist of conclusions of law to which no response is  
6 required.

7 9. The allegations in paragraph 9 consist of conclusions of law to which no response is  
8 required.

9 **III. PARTIES**

10 10. Defendants are without information or knowledge sufficient to form a belief as to the truth  
11 of the allegations in paragraph 10 concerning Plaintiff Center for Biological Diversity, and on that  
12 basis deny the allegations.

13 11. Defendants are without information or knowledge sufficient to form a belief as to the truth  
14 of the allegations in paragraph 11 concerning Plaintiff Center for Biological Diversity, and on that  
15 basis deny the allegations.

16 12. Defendants are without information or knowledge sufficient to form a belief as to the truth  
17 of the allegations in paragraph 12 concerning Plaintiff Center for Biological Diversity, and on that  
18 basis deny the allegations.

19 13. Defendants are without information or knowledge sufficient to form a belief as to the truth  
20 of the allegations in paragraph 13 concerning Plaintiff Turtle Island Restoration Network, and on  
21 that basis deny the allegations.

22 14. The allegations in paragraph 14 consist of conclusions of law and characterizations of  
23 Plaintiffs' case to which no response is required.

24 15. The allegations in the first sentence of paragraph 15 consist of conclusions of law and  
25 characterizations of Plaintiffs' case to which no response is required. Defendants deny the  
26 allegations in the second sentence of paragraph 15 and aver that the Service bases its marine  
27

1 mammal management decisions on the best available information regardless of the status of the  
2 stock assessment report. Defendants deny the allegations in the third sentence of paragraph 15 and  
3 aver that the Service does not rely solely on information contained in stock assessment reports and  
4 analyzing potential threats to marine mammal species is not dependent on their revision. Defendants  
5 deny the allegations in the fourth sentence of paragraph 15 and aver that all marine mammal  
6 management decisions are based on the best available information regardless of the status of a stock  
7 assessment report and further aver that no activity has been permitted by the Service that adversely  
8 affects the survival or recovery of a species or stock or increases the chances of a population decline  
9 or other adverse impact to the species or stock. The allegations in the fifth sentence of paragraph 15  
10 consist of conclusions of law and characterizations of Plaintiffs' case to which no response is  
11 required.

12 16. The allegations in the first sentence of paragraph 16 consist of conclusions of law and  
13 characterizations of Plaintiffs' case to which no response is required. The allegations in the second  
14 and third sentences of paragraph 16 purport to characterize certain provisions of the MMPA, which  
15 speak for themselves and are the best evidence of their contents. Any allegations inconsistent with  
16 the plain language and meaning of the MMPA are denied. The allegations in the fourth sentence  
17 of paragraph 16 consist of conclusions of law and characterizations of Plaintiffs' case to which no  
18 response is required.

19 17. The allegations in the first and second sentences of paragraph 17 consist of conclusions  
20 of law and characterizations of Plaintiffs' case to which no response is required. Defendants are  
21 without information or knowledge sufficient to form a belief as to the truth of the allegations in  
22 the third sentence of paragraph 17, and on that basis deny the allegations. The allegations in the  
23 fourth sentence of paragraph 17 consist of conclusions of law and characterizations of Plaintiffs'  
24 case to which no response is required.

25 18. Defendants deny the allegations in the first, second, third, and fourth sentences of paragraph  
26 18 and aver that all marine mammal management decisions, including authorizations for take, are  
27 based on the best available information, regardless of the most recent stock assessment report that

1 has compiled information on a particular stock, and further aver that, while a stock assessment report  
2 provides the potential biological removal level ("PBR") for the stock, PBR is used only under  
3 section 118 of the MMPA, 16 U.S.C. § 1387, for take reduction planning purposes associated with  
4 commercial fishing and that no marine mammal species or stock under Service jurisdiction has been  
5 the subject of the section 118 take reduction planning process. Defendants are without information  
6 or knowledge sufficient to form a belief as to the truth of the allegations in the fifth sentence of  
7 paragraph 18, and on that basis deny the allegations.

8 19. In response to the allegations in paragraph 19, Defendants admit that Dirk Kempthorne is  
9 the Secretary of the Interior and that he is charged with administering the MMPA with respect to  
10 certain species, and admit that he is sued in his official capacity, but otherwise deny the allegations.

11 20. In response to the allegations in the first sentence of paragraph 20, Defendants admit that the  
12 Service is a federal agency within the U.S. Department of the Interior and is charged with  
13 administering certain federal laws, including the MMPA, with respect to certain species, but  
14 otherwise deny the allegations. In response to the allegations in the second sentence of paragraph  
15 20, Defendants admit that the Director of the U.S. Fish and Wildlife Service has been delegated the  
16 responsibility to administer the MMPA with respect to certain species. In response to the allegations  
17 in the third sentence of paragraph 20, Defendants admit that final stock assessment reports for three  
18 stocks of northern sea otters in Alaska, two stocks of polar bears, and one stock of Pacific walrus  
19 were last announced in the Federal Register as available to the public on October 9, 2002 and that  
20 final stock assessment reports for northern sea otters in Washington, southern sea otters, and two  
21 stocks of West Indian manatees were last announced in the Federal Register as available to the  
22 public on October 4, 1995, but otherwise deny the allegations. Defendants deny the allegations in  
23 the fourth sentence of paragraph 20.

#### 24 **IV. LEGAL BACKGROUND**

25 21. The allegations in paragraph 21 purport to characterize certain provisions of the MMPA,  
26 which speak for themselves and are the best evidence of their contents. Any allegations inconsistent  
27

1 with the plain language and meaning of the MMPA are denied.

2 22. The allegations in paragraph 22 purport to characterize certain provisions of the MMPA,  
3 which speak for themselves and are the best evidence of their contents. Any allegations inconsistent  
4 with the plain language and meaning of the MMPA are denied.

5 23. The allegations in paragraph 23 purport to characterize certain provisions of the MMPA,  
6 which speak for themselves and are the best evidence of their contents. Any allegations inconsistent  
7 with the plain language and meaning of the MMPA are denied.

8 24. The allegations in paragraph 24 purport to characterize certain provisions of the MMPA,  
9 which speak for themselves and are the best evidence of their contents. Any allegations inconsistent  
10 with the plain language and meaning of the MMPA are denied.

11 25. Defendants admit the allegations in the first sentence of paragraph 25. The allegations in the  
12 second and third sentences of paragraph 25 purport to characterize certain provisions of the MMPA,  
13 which speak for themselves and are the best evidence of their contents. Any allegations inconsistent  
14 with the plain language and meaning of the MMPA are denied.

15 26. The allegations in paragraph 26 purport to characterize certain provisions of the MMPA,  
16 which speak for themselves and are the best evidence of their contents. Any allegations inconsistent  
17 with the plain language and meaning of the MMPA are denied.

18 27. The allegations in paragraph 27 purport to characterize certain provisions of the MMPA,  
19 which speak for themselves and are the best evidence of their contents. Any allegations inconsistent  
20 with the plain language and meaning of the MMPA are denied.

21 28. The allegations in the first sentence of paragraph 28 purport to characterize certain  
22 provisions of the MMPA, which speak for themselves and are the best evidence of their contents.  
23 Any allegations inconsistent with the plain language and meaning of the MMPA are denied.  
24 Defendants deny the allegations in the second and third sentences of paragraph 28 and aver that the  
25 potential biological removal number is used in take reduction planning for commercial fishing  
26 operations.

27 29. The allegations in the first sentence of paragraph 29 purport to characterize the Service's

1 June 2007, August 2006, May 2006, June 2006, and May 2003 proposed and final incidental take  
2 determinations, Federal Register documents that speak for themselves and are the best evidence of  
3 their contents. Any allegations that are inconsistent with the plain language and meaning of the June  
4 2007, August 2006, May 2006, June 2006, or May 2003 proposed and final incidental take  
5 determinations are denied. Defendants are without information or knowledge sufficient to form a  
6 belief as to the truth or falsity of the allegations in the second sentence of paragraph 29, and on that  
7 basis deny the allegations.

8 30. The allegations in paragraph 30 purport to characterize certain provisions of the MMPA,  
9 which speak for themselves and are the best evidence of their contents. Any allegations inconsistent  
10 with the plain language and meaning of the MMPA are denied.

## 11 **V. FACTUAL BACKGROUND**

12 31. The allegations in paragraph 31 purport to characterize the Service's October 1995 notice  
13 of availability of stock assessment reports, a Federal Register document that speaks for itself and  
14 is the best evidence of its contents. Any allegations that are inconsistent with the plain language and  
15 meaning of the October 1995 notice of availability are denied.

16 32. The allegations in the first sentence of paragraph 32 purport to characterize the Service's  
17 April 1997 notice of availability of stock assessment reports, a Federal Register document that  
18 speaks for itself and is the best evidence of its contents. Any allegations that are inconsistent with  
19 the plain language and meaning of the April 1997 notice of availability are denied. Defendants admit  
20 the allegations in the second and third sentences of paragraph 32.

21 33. The allegations in the first sentence of paragraph 33 purport to characterize the Service's  
22 September 1998 notice of availability of stock assessment reports, a Federal Register document that  
23 speaks for itself and is the best evidence of its contents. Any allegations that are inconsistent with  
24 the plain language and meaning of the September 1998 notice of availability are denied. The  
25 allegations in the second sentence of paragraph 33 purport to characterize the Service's October  
26 2002 notice of availability of stock assessment reports, a Federal Register document that speaks for  
27 itself and is the best evidence of its contents. Any allegations that are inconsistent with the plain

1 language and meaning of the October 2002 notice of availability are denied. Defendants deny the  
2 allegations in the third sentence of paragraph 33.

3 34. In response to the allegations in paragraph 34, Defendants admit that final stock assessment  
4 reports for three stocks of northern sea otters in Alaska, two stocks of polar bears, and one stock of  
5 Pacific walrus were last announced in the Federal Register as available to the public on October 9,  
6 2002 and that final stock assessment reports for northern sea otters in Washington, southern sea  
7 otters, and two stocks of West Indian manatees were last announced in the Federal Register as  
8 available to the public on October 4, 1995, but otherwise deny the allegations.

9 35. In response to the allegations in the first, second, and third sentences of paragraph 35,  
10 Defendants admit that new information has become available since publication of the last notices  
11 of availability of stock assessments in the Federal Register for the species under the Service's  
12 jurisdiction, but otherwise deny the allegations. The allegations in the fourth sentence of paragraph  
13 35 consist of conclusions of law to which no response is required.

14 36. In response to the allegations in paragraph 36, Defendants admit that new information has  
15 become available since publication of the last notices of availability of stock assessments in the  
16 Federal Register for the species under the Service's jurisdiction, but otherwise deny the allegations.

17 37. Defendants deny the allegations in the first sentence of paragraph 37. The allegations in the  
18 second sentence of paragraph 37 purport to characterize the Service's 2007 proposed rule to list the  
19 polar bear as threatened under the Endangered Species Act, a Federal Register document that speaks  
20 for itself and is the best evidence of its contents. Any allegations that are inconsistent with the plain  
21 language and meaning of the 2007 proposed rule are denied. In response to the allegations in the  
22 third sentence of paragraph 37, Defendants admit that polar bears use sea ice for denning and for  
23 catching their preferred prey species and that increased temperatures are resulting in changes in the  
24 polar bears' sea ice habitat, but otherwise deny the allegations in the third sentence of paragraph 37.  
25 Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity  
26 of the allegations in the fourth sentence of paragraph 37, and on that basis deny the allegations. The  
27 allegations in the fifth sentence of paragraph 37 purport to characterize the Service's September



1 2007 notice reopening the public comment period on the proposed rule to list the polar bear as  
2 threatened under the Endangered Species Act, a Federal Register document that speaks for itself and  
3 is the best evidence of its contents. Any allegations that are inconsistent with the plain language and  
4 meaning of the September 2007 notice are denied. Defendants deny the allegations in the sixth  
5 sentence of paragraph 37.

6 38. In response to the allegations in the first sentence of paragraph 38, Defendants admit that  
7 new information has become available on walruses since 2002, but otherwise deny the allegations  
8 in the first sentence of paragraph 38. Defendants are without information or knowledge sufficient  
9 to form a belief as to the truth of the allegations in the second and third sentences of paragraph 38,  
10 and on that basis deny the allegations. Defendants admit the allegations in the fourth sentence of  
11 paragraph 38. In response to the allegations in the fifth sentence of paragraph 38, Defendants admit  
12 that in November 2003, June 2006, July 2006, August 2006, and July 2007 authorizations to take  
13 small numbers of Pacific walrus in the Beaufort Sea and Chukchi Sea were issued relating to oil and  
14 gas activities, but otherwise deny the allegations.

15 39. In response to the allegations in paragraph 39, Defendants admit that since 2002 off-shore  
16 oil and gas lease sales in Alaska have been held by the Minerals Management Service, an agency  
17 of the Department of the Interior, but otherwise deny the allegations.

18 40. Defendants deny the allegations in the first sentence of paragraph 40. The allegations in the  
19 second sentence of paragraph 40 purport to characterize the Service's 2005 rule listing the southwest  
20 Alaska distinct population segment of northern sea otter as threatened under the Endangered Species  
21 Act, a Federal Register document that speaks for itself and is the best evidence of its contents. Any  
22 allegations that are inconsistent with the plain language and meaning of the 2005 rule are denied.  
23 Defendants are without information or knowledge sufficient to form a belief as to the truth of the  
24 allegations in the third sentence of paragraph 40, and on that basis deny the allegations. Defendants  
25 admit the allegations in the fourth sentence of paragraph 40, except that Defendants aver that there  
26 have not been substantial changes in the geographic range, population size, trend, productivity rate,  
27 or human-caused mortality and serious injury to the south-central or southeast stocks of northern sea

1 otters in Alaska. The allegations in the fifth sentence of paragraph 40 purport to characterize a 2006  
2 Service press release, a document that speaks for itself and is the best evidence of its contents. Any  
3 allegations that are inconsistent with the plain language and meaning of the 2006 press release are  
4 denied. The allegations in the sixth sentence of paragraph 40 purport to characterize certain  
5 provisions of the MMPA, which speak for themselves and are the best evidence of their contents.  
6 Any allegations inconsistent with the plain language and meaning of the MMPA are denied.

7 41. Defendants deny the allegations in paragraph 41.

8 42. The allegations in the first and second sentences of paragraph 42 purport to characterize the  
9 Service's April 1997 notice of availability of stock assessment reports, a Federal Register document  
10 that speaks for itself and is the best evidence of its contents. Any allegations that are inconsistent  
11 with the plain language and meaning of the 1997 notice are denied. Defendants admit the  
12 allegations in the third sentence of paragraph 42.

13 43. Defendants deny the allegations in paragraph 43.

14 44. Defendants deny the allegations in the first sentence of paragraph 44. The allegations in the  
15 second sentence of paragraph 44 purport to characterize the Service's 2003 notice regarding a  
16 proposed rule to authorize incidental take of Florida manatees, a Federal Register document that  
17 speaks for itself and is the best evidence of its contents. Any allegations that are inconsistent with  
18 the plain language and meaning of the 2003 notice are denied. Defendants admit the allegations in  
19 the third sentence of paragraph 44. In response to the allegations in the fourth sentence of paragraph  
20 44, Defendants admit that 417 manatee mortalities were documented by the Florida Fish and  
21 Wildlife Conservation Commission in 2006, of which 92 were caused by watercraft, but otherwise  
22 deny the allegations in the fourth sentence of paragraph 44. Defendants are without information or  
23 knowledge sufficient to form a belief as to the truth of the allegations in the fifth sentence of  
24 paragraph 44, and on that basis deny the allegations. Defendants admit the allegations in the sixth  
25 sentence of paragraph 44. Defendants are without information or knowledge sufficient to form a  
26 belief as to the truth of the allegations in the seventh sentence of paragraph 44, and on that basis  
27 deny the allegations. In response to the allegations in the eighth sentence of paragraph 44,

1 Defendants admit that new information has become available since publication of the last notice of  
2 availability of stock assessments for manatees in the Federal Register, but otherwise deny the  
3 allegations.

4 45. Defendants deny the allegations in the first and second sentences of paragraph 45. In  
5 response to the allegations in the third sentence of paragraph 45, Defendants admit that sea otters  
6 are affected by disease, but otherwise deny the allegations. Defendants admit the allegations in the  
7 fourth sentence of paragraph 45.

8 46. Defendants deny the allegations in the first sentence of paragraph 46. In response to the  
9 allegations in the second and third sentences of paragraph 46, Defendants admit that the potential  
10 biological removal level and information on the stock's range, sources of human-caused mortality  
11 and serious injury and other factors that may be causing decline or impeding recovery, and current  
12 population trend are included in stock assessment reports, but otherwise deny the allegations.  
13 Defendants deny the allegations in the fourth sentence of paragraph 46. In response to the  
14 allegations in the fifth sentence of paragraph 46, Defendants admit that the Service has authorized  
15 the taking of marine mammal species under its jurisdiction consistent with the requirements of the  
16 MMPA and all other applicable laws, but otherwise deny the allegations.

17 47. The allegations in paragraph 47 consist of conclusions of law and characterizations of  
18 Plaintiffs' case to which no response is required.

19 48. Defendants deny the allegations in paragraph 48.

#### 20 **CLAIM FOR RELIEF**

21 49. All responses to allegations in the above paragraphs are incorporated herein by reference.

22 50. Defendants deny the allegations in paragraph 50.

23 51. Defendants deny the allegations in paragraph 51.

24 52. Defendants deny the allegations in paragraph 52.

#### 25 **PRAYER FOR RELIEF**

26 The remainder of Plaintiffs' Complaint consists of Plaintiffs' Prayer for Relief, to which no  
27 response is required. To the extent a response may be deemed to be required, Defendants deny that

1 Plaintiffs are entitled to the relief requested in their Complaint or to any relief whatsoever.

2 **GENERAL DENIAL**

3 Defendants deny each and every allegation of the Complaint not otherwise expressly  
4 admitted, qualified, or denied herein. To the extent that any allegations in Plaintiffs' Complaint  
5 remain unanswered, Defendants deny such allegations.

6 **AFFIRMATIVE DEFENSES**

- 7 1. Plaintiffs have failed to state a claim upon which relief can be granted.  
8 2. Plaintiffs lack standing to bring some or all of their claims.  
9 3. Venue is improper or may be more appropriate in another judicial district.

10 WHEREFORE, Defendants deny that Plaintiffs are entitled to the relief requested, or to any  
11 relief whatsoever, and request that this action be dismissed with prejudice, that judgment be entered  
12 for the Defendants, and that the Court order such other and further relief as the Court may allow.

13  
14 Dated: December 3, 2007

Respectfully Submitted,

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